

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.563 OF 2002**

Sou. Gangubai Bhagwan Kolhe

Aged 65 years, occupation
household, residing at
CTS No.2478, Khurpe Bol,
Barshi, Dist : Solapur

... Appellant
(Original Plaintiff)

Versus

- 1. Shri Bhagwan Bandu Kolhe**
since deceased, represented
- a) Sou. Sunanda Manik Waychal**
Aged 52 years, occupation,
Agriculture, residing
at Pangri, Tal : Barshi,
Dist : Solapur
- b) Sou. Annapoorna Shivmurti Pisure,**
aged 48 years,
Occupation Agriculture,
residing at Khurpe Bol,
(Wada of Jangam Master),
Barshi, Dist : Solapur
- 2. Shri Gururaj Dagdu Kolhe**
Aged 60 years, occupation
Agriculture, residing at
F-44, State Bank Nagar,
Kothrud, Pune-411029
- 3. Sou. Aruna Balvant Tavaskar**
Aged 52 years,
Occupation Agriculture,
residing at Pangri,
Tal : Barshi,
Dist : Solapur.
- 4. Shri Hiraji Abbas Shaikh**
Aged 53 years, occupation
Agriculture, residing at
Pangri, Tal : Barshi,
Dist : Solapur.

5. **Sou. Noorjah Amin Attar**
Aged 53 years, occupation
Agriculture, residing at
Pangri, Tal : Barshi,
Dist : Solapur.
6. **Sou. Lalphabi Pharid Kazi**
Aged 55 years, occupation
Agriculture, residing at
Pangri, Tal : Barshi,
Dist : Solapur.
7. **Sou. Sunanda Manik Vaychal**
Aged 52 years, occupation
Agriculture, residing at
Pangri, Tal : Barshi,
Dist : Solapur.
8. **Sou. Annapoorna Shivismurti Pisure**
aged 48 years, occupation
Agriculture, residing at
Khurpe Bol, (Wada of Jangam
Master), Barshi,
Dist : Solapur.

... Defendants
(Original Deft. Nos. 1 to 8)

Mr. Uday P. Warunjikar, learned Advocate for the
appellant

Mr. Vineet B. Naik with Mr. R.S. Alange and Shri Priyal
Sarda, learned Advocates for the Respondent Nos. 3,4 and
6

Mr.A.K.Saxena, learned Advocate for Respondent No.8

CORAM : S.R. SATHE, J.

DATED : 14/11/2006 & 15/11/2006

ORAL JUDGEMENT :-

1. Heard both the learned advocates at length as
it was agreed to decide the matter finally at admission
stage.

2. The Appellant-original Plaintiff in Regular Civil Suit No. 86/1985 has preferred this appeal against the judgement and order passed by the Court of 3rd Additional District Judge, Solapur whereby the judgement and order passed by the Civil Judge, Junior Division, Barshi dismissing the plaintiff's suit for declaration and partition was confirmed and appeal was dismissed. For the sake of convenience hereafter parties shall be referred to as '*Plaintiff*' and '*Defendants*'.

3. The brief facts giving rise to this appeal are as under :-

Plaintiff Gangubai Bhagwan Kolhe is the wife of Original Defendant No.1 (He died during the pendency of the suit on 13/05/1992). The Defendant Nos. 7 and 8 are the daughters of Plaintiff and defendant No.1. The defendant Nos. 2 to 6 are purchasers of the suit property.

4. According to Plaintiff, the suit properties which are as agricultural lands and house property described in detail in paragraph-1 of the plaint are ancestral properties of the defendant No.1. It is the

case of Plaintiff that for few years, defendant No.1 treated her properly. Out of the said wedlock, they have two daughters i.e. defendant Nos. 7 and 8. It is Plaintiff's case that defendant No.1 was addicted to vices of gambling and drinking. Some time in the year 1982-83, defendant No.1 drove her out of the house. She, therefore, filed Miscellaneous Application under section 125 of Criminal Procedure Code and claimed maintenance. With a view that Plaintiff should not get any share in the property, the defendant No.1 sold the suit land bearing Gut No. 202 to defendant No.2 on 07/07/1980. Similarly, on 22/02/1983, the defendant No.1 sold Gut No.204 to defendant No.3. According to Plaintiff, both these Sale Deeds are without consideration and as such null and void. Besides this, there was in fact no legal necessity for sale of the said ancestral property. Plaintiff, therefore, issued notice to the defendants on 11/06/1983. But the defendant No.3 gave false reply. During the pendency of the suit, the defendant No.1 sold Gut No. 207 to Defendant No.4 Hiraji Abbas Shaikh hence he was impleaded in the suit. The house property bearing No. 1028 was also sold by the defendant to defendant No.5. According to Plaintiff, all these Sale Deeds were not binding on her as she was having one half share in the

suit property. Hence, Plaintiff filed the present suit for declaration that the above mentioned Sale Deeds are null and void and also prayed for partition and separate possession of her one half share in the suit property. Alternatively, she prayed that in case it is found that such share can not be given to the Plaintiff, then defendant No.1 be directed to pay maintenance of Rs. 250/- per month to her and charge of the said maintenance amount be kept on the suit property.

5. The defendant No.1 filed his Written Statement at Exh-21 and opposed the suit claim. Firstly, he contended that the suit properties are not the ancestral properties and Plaintiff is not having any share in the same. He also denied that Plaintiff is his legally wedded wife and she has two daughters from him. He also denied the allegations that he was addicted to vices. He, however, admitted that maintenance application bearing No. 74/1983 was filed by Plaintiff against him. According to him, Plaintiff was originally residing at Barshi. She used to come to Pangri for selling vegetables. As she had no place to reside and was acquainted with him, he used to allow her to stay in his house whenever she used to come to Pangri.

However, taking undue advantage of the same and finding that he is not having any issue, with a view to grab the suit property, the Plaintiff has filed the false suit. He, therefore, prayed for the dismissal of the suit.

6. Defendant No.2 Gururaj Dagdu Kolhe filed Written Statement at Exh-26 and also contended that the suit property was not the ancestral property of defendant No.1 Bhagwan B. Kolhe and as such Plaintiff has no share in it. He also contended that he has no knowledge whether the Plaintiff is legally wedded wife of defendant No.1. It was contended that the Sale Deed executed in favour of defendant No.2 by Plaintiff was for consideration and the same is legal and valid. The suit property was received by defendant No.1 Bhagwan through his uncle under the gift deed. Hence, Plaintiff was not entitled to get any share in the same. Hence on all these grounds, defendant No.2 prayed for the dismissal of the suit.

7. Defendant No.3 filed her Written Statement at Exh-24 and took similar contentions. She also contended that she has no knowledge regarding public notice issued by the Plaintiff in Daily Sanchar on 02/03/1981.

She further contended that defendant No.1 Bhagwan wanted to clear various loans and was in need of money for carrying out improvements in his field and as such he sold the suit property bearing Gut No.204 to her. She, therefore, contended that Plaintiff is not entitled to get relief as prayed.

8. The defendant Nos. 4 and 6 filed joint Written Statement Exh-83 and also took similar contentions. Besides this, they contended that after the property bearing Gut No. 207 was purchased by defendant No.4, his name was also entered in the record of rights. Plaintiff had preferred RTS Appeal No. 10/1985 against the said entry but that was also dismissed. He further contended that after purchase of the property, he carried out improvements in the suit property and hence on all these grounds, the defendant prayed for the dismissal of the suit.

9. Defendant Nos. 7 and 8 are the daughters of Plaintiff. They filed joint Written Statement and supported the claim of the Plaintiff.

10. On these pleadings the learned Trial Judge framed issues at Exh-35. In order to prove the suit

claim, Plaintiff examined her son-in-law Manik Waychal who was also power of attorney holder of Plaintiff at Exh-124 and witness Ramchandra Gaware Exh-151. Defendant No.2 Gururaj D. Kolhe examined himself at Exh-154. On behalf of defendant No.3, her husband Balwant Tawaskar is examined at Exh-162. While Defendant No.4 Hiraji is examined at Exh-177. Defendant No.6 examined herself at Exh-181 and defendant No.7 examined herself at Exh-188. Both the parties produced several documents. After considering the evidence adduced by both the parties, learned Trial Judge came to the conclusion that Plaintiff has failed to prove that the suit property is ancestral property of defendant No.1 and Plaintiff has one half share in the same. He also held that Sale Deed executed by defendant No.1 in favour of Defendant No.2,3 and 4 are legal and valid and for consideration and they are bonafide purchasers for value without notice. According to him, Plaintiff also failed to prove the claim with regard to maintenance. He, therefore, dismissed the Plaintiff's suit.

11. Being aggrieved by the above mentioned order the Plaintiff filed Regular Civil Appeal No. 370/1995 in the Court of District Judge, Solapur. However,

learned 3rd Additional District Judge, Solapur dismissed the said appeal.

12. The above mentioned order passed by the First Appellate Court is challenged by the Original Plaintiff in the present Second Appeal.

13. In this appeal, before me Mr. Uday P. Warunjikar, learned Advocate for the original plaintiff submitted that though there is concurrent finding of facts, given by the Courts below, the substantial question of law involved in this matter is whether the Courts below failed to take into consideration the fact that order for maintenance in favour of Plaintiff was passed by the Court of JMFC in Miscellaneous Application No.74/1983 and having regard to the provision of section 39 of the Transfer of Property Act, 1882, charge of the said amount ought to have been kept on the suit properties. As against this, Mr. Vineet B. Naik, learned Advocate for the Respondent Nos. 3,4 and 6 supported the judgement and order passed by the Court of 3rd Additional District Judge and submitted that as defendant Nos. 3,4 and 6 are bonafide purchasers of the suit property and had no notice of Plaintiff's claim with regard to maintenance, the

provision of section 39 of the Transfer of Property Act can not be invoked into and the appeal be dismissed.

14. At the outset, it must be mentioned that though the defendant No.1 had contended in his Written Statement that Plaintiff is not his legally wedded wife and defendant No.7 and 8 are not his daughters, it has come on record that Plaintiff had filed Miscellaneous Application No.74/1983 for maintenance and it was held in that proceedings that defendant No.1 is the legally wedded wife of Plaintiff. Ofcourse it is observed in the said judgement that considering the standard of proof required for proving case under section 125 of Criminal Procedure Code, such finding is recorded. However it must be noted that there is nothing on record to indicate that the said order was challenged by the defendant No.1 in the Superior Court or that he had filed any suit for declaration in the Civil Court that Plaintiff is not his legally wedded wife. On the contrary, it has come on record that defendant Nos. 7 and 8 are the daughters of Plaintiff. Thus, both the Courts below have in fact held that Plaintiff is wife of defendant No.1. However, it has been categorically observed by the Courts below that Plaintiff has failed to prove that the suit property is ancestral property.

It is pertinent to note that the contentions of the defendant No.1 that he received the suit land from his uncle Ramling S. Kolhe is established from the Gift Deed Exh-156 which is executed in favour of defendant No.1 by Ramling S. Kolhe on 30/11/1950. Not only that, we find that in the subsequent Sale Deeds which are executed by the defendant No.1 in favour of defendant Nos. 2 to 4, there is mention that suit properties are received by defendant No.1 by virtue of Gift. Plaintiff has not at all produced even single document to show that the suit property was initially owned by the ancestors of defendant No.1. So, under such circumstances, both the Courts below rightly held that the Plaintiff has failed to prove that the suit property is the ancestral property of the defendant No.1.

15. It is an admitted fact that the Plaintiff did not step into the witness box to prove her case and she only examined her power of attorney. Both the Courts below rightly held that no cogent evidence was adduced by the Plaintiff to show that she is entitled to get maintenance of Rs. 250/- per month as claimed in the plaint. The main and the material point which falls for consideration in this appeal is whether the charge of

maintenance amount of Rs. 60/- per month granted by the Court of JMFC in Criminal Miscellaneous Application No.74/1983 can be kept on the suit properties, in view of the provision of section 39 of the Transfer of Property Act. This is in fact the only substantial issue involved in this matter.

16. It would be worthwhile to see what section 39 of the Transfer of Property Act says. It runs as follows :-

Section-39 : Transfer where third person is entitled to maintenance - Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice (thereof) or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

17. In order to support his submission, Mr. Uday P. Warunjikar, learned Advocate for the Plaintiff has placed reliance on a case **Kare More Sharabanna Rudrappa and ors. V/s. Basamma and others, AIR 1962 MYSORE 207** wherein Their Lordship have held that where wife and

children of a person have a right to be maintained out of his property, their maintenance can be made a charge over his properties not only in his hands but also transferred by him gratuitously to avoid their claims. This proposition is in fact not disputed by the other side. However, it was argued on behalf of the defendants that in the instant case, both the Courts below have held that the properties transferred by defendant No.1 to other defendants are for consideration. From the said Sale Deeds, it is also clear that defendant No.1 was to clear certain loans including Tagai loan and also wanted to carry out development in the other fields and so such transaction can not be said to be gratuitous or without legal necessity. Besides this, there is absolutely no evidence to show that the purchaser had knowledge about Plaintiff's case regarding maintenance or that charge of the maintenance amount was kept on the suit property. According to Mr. Vineet B. Naik, learned Advocate for the Defendant Nos. 3,4 and 6, the said defendants are bonafide purchasers for value without notice and naturally, under such circumstances, the provision of section 39 can not be invoked.

18. It is the case of the Plaintiff that on

27/02/1981, she had given a public notice disclosing her rights in the suit property. However, the issue of Daily Sanchar or copy of the notice alleged to have been issued on 27/02/1981 is not produced and proved by the Plaintiff. Naturally, the question arises whether the defendant No.2 Gururaj Kolhe had knowledge about the Plaintiff's claim regarding maintenance on the date when he purchased the suit property i.e. on 07/07/1980. When even according to Plaintiff, first public notice was issued on 27/02/1981 and the maintenance petition was filed on 08/04/1983, it goes without saying that there was no reason for the defendant No.2 to have knowledge about the alleged claim of Plaintiff regarding her maintenance. So, I have absolutely no hesitation to hold that so far as the purchase of said block No. 202 by defendant No.2 is concerned, no charge can be kept on the said property.

19. So far as the land bearing Block No. 204 is concerned, the same has been sold by Defendant No.1 to Defendant No.3 Sou. Aruna B. Tavaskar by virtue of registered Sale Deed Exh-138 dated 22/02/1983, that is also prior to the time Plaintiff filed Miscellaneous Application No.74/1983 for maintenance and there is nothing on record to indicate that defendant No.3 had

knowledge about the Plaintiff's claim about maintenance. The Sale Deed is also for consideration and Defendant No.3 is also a bonafide purchaser for value without notice. So, the charge of the maintenance amount of Rs. 60/- per month granted to Plaintiff by the Court of JMFC in Criminal Miscellaneous Application No. 74/1983 can not be kept on the said property. Same is the case in respect of the property bearing Block No.207. Though the Sale Deed is executed by the defendant No.1 in favour of Hiraji Shaikh subsequent to the filing of Criminal Miscellaneous Application No.74/1983, there is nothing on record to show that he had knowledge about Plaintiff's claim of maintenance. Moreover, the application for maintenance filed by Plaintiff was in fact not decided at that time. The said Sale Deed was also for consideration and he was bonafide purchaser for value without notice. So, the same is also not liable for keeping any charge. Thus, the provision of section 39 of Transfer of Property Act are certainly not applicable to the sale transaction which are made in favour of defendant No.2 Gururaj Kolhe in respect of Block No.202, sale transaction in favour of Aruna Tavaskar in respect of Block No.204 and the sale transaction executed in respect of Block No.207 in favour of Hiraji Abbas Shaikh i.e. Defendant

No.4.

20. So far as Gram Panchayat Property No.1028, extract of which is produced at Exh-133 is concerned, it is Plaintiff's case that the said property was sold by defendant No.1 to defendant No.5 on 13/06/1985 and subsequently, during the pendency of this suit, it was sold by defendant No.5 to defendant No.6. There is no cogent evidence to show that defendant No.5 had knowledge of plaintiffs claim of maintenance against the said property. The question of applying the provision of section 39 of Transfer of Property Act to the said property does not arise. Besides this, the present owner has not purchased the said property directly from the defendant No.1. So under such circumstances, no charge of the maintenance amount can not be kept on the said property.

21. Now remains the question of only one suit property i.e. Grampanchayat Property No. 310, extract of which is produced at Exh-132. The said extract shows that the said property stands in the name of defendant No.1. Admittedly, Plaintiff has not filed suit for partition alleging that she is having a share as she being the heir of deceased defendant No.1.

22. Under the above circumstances, question arises whether charge in respect of the maintenance of Rs. 60/- per month granted to Plaintiff in Miscellaneous Application No. 74/1983 u/s. 125 of Cr.P.C. can be kept on this property. As both the learned advocates had not at all specifically argued this point when the matter was initially heard. Both the learned Advocates were asked to make submissions on this point. Both the learned Advocates fairly submitted that considering the legal point involved in the matter, they would make some search and make submissions tomorrow.

Date : 15/11/2006

23. In view of above, today I have heard both the learned Advocates. Shri Warunjikar, learned Advocate for the appellant submitted that taking into consideration the very object of the provision under section 125 of Criminal Procedure Code and the fact that the defendant No.1 has left behind some property, the wife should be entitled to recover the amount of maintenance out of that property and for that purpose, the Civil Court can pass a decree creating a charge on such property. As against this, the learned Advocate for the Respondent submitted that charge can not be

created as the defendant No.1 has expired and as per the provision of section 27 of Hindu Adoption and Maintenance Act, there is bar to create such charge. Firstly, it must be noted that in the instant case, the maintenance is in fact not fixed by the Civil Court as prayed in the plaint. However, at the same time, it is an admitted position that the wife had filed Criminal Miscellaneous Application under section 125 of Criminal Procedure Code and in that maintenance order to pay Rs. 60/- per month has been passed. So in my opinion, once there is a valid order of the Court thereby giving right to the wife to recover maintenance from the husband and as per the provision of Criminal Law she is entitled to proceed even against the assets of the husband for the recovery of such maintenance, then, in order to see that fruits of the order passed under 125 of Criminal Procedure Code are received by the wife, charge can be kept on the assets of the husband. There can not be any question of application of section 27 of Hindu Adoption and Maintenance Act in the facts of the present case.

24. In a case **Prithviraj Singh V/s. Smt. Pavanvir Kaur 1986 CRI. L.J. 1432**, the Single Judge of Punjab and Haryana High Court has held that arrears of

maintenance are recoverable from the husband's estate up to date of his death but not thereafter. However, I for one do not agree with the later portion of this observation. Once it is held that wife is entitled to proceed against the estate of husband for recovery of maintenance granted under section 125 of Cr.P.C. then if such wife has approached the Civil Court and has prayed that as husband is bound to pay maintenance as per the order passed by the Criminal Court, charge of that amount be kept on his property, then she is justified in doing so. Though it is true that the order of maintenance is always against the husband and it is his personal liability still it would not be proper to hold that by virtue of death of the husband the liability created by order passed under section 125 of Criminal Procedure Code comes to an end. If we carefully peruse section 125 of Cr. P.C., we find that there is nothing in the said section which says that the order comes to an end on the death of husband. No doubt if order under section 125 of Cr.P.C. is passed against a divorced wife then the order will come to an end if she remarries. In my opinion, once the order for maintenance is passed against a wife under section 125 of Cr.P.C., it becomes permanent liability of the husband to provide such maintenance to the wife so long

as she is alive and is otherwise not disentitled as a result of happening of any event contemplated under section 125 of Cr.P.C. It is a liability not only against husband but also against husband's property. Merely because husband has died, one can not say that now the wife is not entitled to recover the amount of maintenance out of the assets of the husband. If such narrow interpretation is accepted, then the very purpose of section 125 of Cr.P.C. would come to an end.

25. It is needless to say that section 125 of Cr.P.C. is a measure of social justice falling within the Constitutional sweep of articles 15(3) & 39 enacted to protect the weaker sections like women and children. The object is to compel a married person to perform the moral obligation which he owes to society in respect of his wife and children so that they are not left beggarred and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. So, bearing in mind the very object and social purpose of section 125 of Cr.P.C., the said section must receive in its interpretation a compassionate expanse of the sense that the words permit. So, in order to achieve the object of section 125 of Cr.P.C. it has to be held that

order passed under section 125 of Cr.P.C. is not only against husband but it is against husband's property also.

26. If such view is not taken then situation may arise where unscrupulous husband with a view to harass his wife may during his life time dispose of his entire property so that after his death his wife would not get anything by inheritance and she will be on street. This situation will arise if narrow interpretation is accepted and held that order under section 125 of Cr.P.C. comes to an end after the death of husband. If in a given case, after the death of husband, wife inherits some property which is sufficient to cover the maintenance amount granted to her then ofcourse she will not be entitled to have a double benefit. So, considering the object of section 125 of Cr.P.C. as well as of section 39 of the Transfer of Property Act as well as having regard to well settled principle of law that in interpreting provision of any statute the Court must adopt that construction which suppresses the mischief and advances remedy, I think that it is necessary to keep a charge in respect of the amount of maintenance of Rs. 60/- per month granted to the Plaintiff on the property of her husband i.e. property

bearing No.310 of Village Pangri, Taluka Barshi. Hence I pass the following order :-

O R D E R

1. Appeal against defendant Nos. 1 to 8 in respect of the property bearing Block No.202, 204, 207 and Gram Panchayat Property No. 1028 is dismissed.
2. For the amount of maintenance granted in favour of Plaintiff in Criminal Miscellaneous Application No. 74/1983 i.e. Rs. 60/- p.m., charge of the said amount is kept on the property bearing Gram Panchayat No. 310 of Village Pangri, Tal. Barshi.
3. Considering the peculiar facts and circumstances of the case, parties to bear their own costs.

(S.R. SATHE, J.)